No. 15,251

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW BING KEW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable Chief Judge William Denman, Judge Homer T. Bone, and Judge James Alger Fee, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant, Chow Bing Kew, respectfully petitions for a rehearing in the above cause, on the ground that the decision of this Court entered on May 20, 1957 is erroneous in the following respects, to wit:

(1) In concluding that the trial court had not rested its judgment upon the proposition that carelessness was synonymous with guilt;

(2) In regarding evidence of other alleged misrepresentations as tending to prove that appellant made the misrepresentation charged in the indictment.

I.

THE TRIAL COURT BASED ITS JUDGMENT UPON THE ERRONEOUS PROPOSITION THAT CARELESSNESS WOULD JUSTIFY CONVICTION.

This Court quotes certain language in the "Judgment and Commitment," filed June 26, 1956 (T. 20-22), as indicating that the trial court made a finding that appellant had wilfully (i.e. consciously) made the representation referred to in the indictment. But a month previously, on May 28, 1956, the trial court had filed a formal "Judgment" (T. 14-15) which reads as follows:

"Judgment

"In accordance with the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal filed herein, it is the judgment of the court that the defendant is guilty as charged in counts one and two of the indictment.

"Further, it is ordered that the defendant be referred to the Probation Office for a presentence report, and the time of sentence is tentatively set for June 26, 1956, at 2 p.m. in the United States Courthouse in Sacramento, California."

This Judgment, filed on May 28, was the determination and adjudication of guilt, and the subsequent

"Judgment and Commitment" consisted of the pronouncing of sentence plus a mere *recital* of what had *previously* taken place (determination of guilt and imposition of sentence being separate steps in the proceeding—Cf. *Pollard v. United States,* 77 S. Ct. 481, 484, 352 U.S. 360, 1 L. Ed. 393, 397).

The "Judgment and Commitment" filed on June 26, 1956 is in the form suggested in the specimen forms promulgated with the Federal Rules of Criminal Procedure and contains the recitals prescribed in those rules. But, as this Court has said in *Sanders v. Johnston,* 165 F. 2d 736 (cert. den. 68 S. Ct. 1328, 334 U.S. 829, 92 L. Ed. 1757, rehearing denied 69 S. Ct. 7, 335 U.S. 838, 93 L. Ed. 390):

> "Rule 32(b) prescribes a recital in the judgment of the several steps taken by the court during the progress of a case from the entry of a plea to the pronouncement of sentence. Such a recital in the judgment would be prima facie evidence that the steps set forth therein actually took place, but it does not follow that a failure to make such a recital in the written judgment nullifies steps which did in fact occur."

Conversely, in the case at bar the mere recital in the June 26 "Judgment and Commitment" of the several steps which had *theretofore* been taken in the case, could not nullify the fact that the adjudication of guilt *which the court had already made* and filed on May 28th *was expressly based on the findings of fact and conclusions of law contained in the ruling of the same date (T. 5-14) on the motions for judgment of ac-*

quittal, and those findings and conclusions on the issue of wilfulness simply stated that appellant "is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality" (T. 8).

We see no escape from the conclusion that the trial court based its judgment of guilt upon this finding of fact and conclusion of law which says in effect that if appellant's claimed ignorance of the contents of the application was due to carelessness, such ignorance would constitute no defense. If this be what the trial court found, then obviously an error of law was made in determining the issue of wilfulness, and such error is in no wise rectified by later recital of the adjudication having been made, even though such later recital happens to be couched in the language of the indictment.

It is strikingly evident that on the question whether the trial court, in determining guilt, applied the erroneous theory that carelessness would warrant conviction, the record, to say the very least, is equivocal. We submit that a conviction of crime should not be permitted to rest upon so equivocal a foundation. This is particularly so when the uncontradicted evidence itself is strongly to the effect that the particular document involved was signed unread, through carelessness rather than design. From the record, it is extremely questionable that the Court found that appellant made the representation charged; on the contrary, the record strongly indicates that the trial court acted under the

erroneous belief that carelessness would be synonymous with guilt.

II.

THE OTHER ALLEGED MISREPRESENTATIONS IN NO WISE TENDED TO ESTABLISH THAT APPLICANT WAS GUILTY OF THE OFFENSE CHARGED.

The opinion of this Court has disposed of all arguments raised by the United States and has concluded that the judgment of the Court below is sustainable only upon one ground, i.e., that evidence of other misrepresentations by appellant could be considered to negate the defense that he had signed the document referred to in the indictment without reading it and in ignorance of the fact that it contained a representation as to citizenship.

We respectfully submit that as a matter of law the conviction is not sustainable on that ground.

While evidence of other acts may be considered to prove intent or knowledge where the criminal act itself is admitted, or has otherwise been proved, such evidence is never competent to prove the doing of the act itself.

Here the criminal act charged is not the mere signing of a paper; it is the making of a representation as to citizenship. If appellant signed the paper unread, then he did not make the representation. If the making of the representation were conceded or proved, then evidence of similar acts could be considered to establish knowledge of its falsity, or lack of innocent intent.

Here, however, the making of the representation itself is denied and that denial is supported by all the testimony relative to the document in question. We submit therefore that the making of the representation cannot be established by evidence that appellant made other representations on other occasions. As stated by Wigmore:

> "It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*—either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent."
>
> *Wigmore on Evidence* (3d Ed.), Vol. 2, Sec. 302, p. 200.

> "Throughout the preceding topics it has been seen that under the Intent theory, the purpose was to negative innocent intent; if the Jury find the act proved, they are to use the evidence in question to determine the Intent."
>
> *Id.* Sec. 348 p. 251.

> "In proving Intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it."
>
> *Id.* Sec. 300 p. 193.

Another exception to the rule excluding evidence of similar acts relates to the use of such evidence to prove Knowledge. However, in that instance, the only knowledge which such evidence would be competent to prove

would be knowledge of the falsity of the representation *if consciously made*—not knowledge that the particular statement was contained in the document which the appellant signed. With regard to the use of such evidence as bearing upon the issue of Knowledge, Wigmore has this to say:

> "Such, then, is the strict and legitimate scope of evidence of other similar acts to show Knowledge. The process of thought is: The other act will probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question."
>
> *Id.* Sec. 301 p. 194.

There is a third exception to the rule excluding evidence of other acts which has to do with the use of such evidence to prove a design or plan. No such situation is here presented because of the wholly disconnected character of the acts under discussion (see *Wigmore* Section 300 at p. 193). However, in discussing the application of the three exceptions to the rule excluding such evidence, with respect to a false representation case, Wigmore has the following comment:

> "In a false representation or pretence, there is involved—alike in all the varieties of offense and in most civil cases as well as in criminal cases—the general notion of Intent to deceive. Within this, and usually decisive in showing it (but capable, as already noted, of being evidenced by a separate principle) is the element of Knowledge. Lastly, in the (here unusual) case *where the act of making the representation is disputed,* and resort is had to a system or design to prove it, the

stricter test applicable to proving Design may be invoked."

Id. Sec. 321 pp. 219-226.

As stated in 10 Ruling Case Law at p. 939:

"It is not competent to prove that he committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the indictment."

* * *

"A man may have committed many crimes and still be innocent of the crime charged in the case on trial."

We submit that in this case evidence of other representations by appellant could not tend to prove in the face of all the evidence to the contrary that he signed the application here in question knowing that it contained the representation of citizenship. Had it been established that the making of such a representation was a volitional act on his part, then evidence of other such acts might bear upon the issues of innocent intent or knowledge of falsity. Such evidence can have no effect in proof of the making of the representation itself. This is particularly so when it is borne in mind that the document itself was prepared by an employee of the Board of Equalization; that appellant had nothing to do with its preparation; that the license being applied for was for a partnership (T. 100); that the concern held a sales permit issued by the Board of Equalization which showed the names of the partners (T. 155), some of whom are citizens (T. 154-155), and in fact, the application itself (T. 30) contained a refer-

ence to this seller's permit No. C-64064. It was well-known to all concerned that this application was for a license for the "Daylite Market" and not for appellant personally, and we submit that there is in the record no substantial support whatever for a finding that appellant knowingly and wilfully represented to the State Board of Equalization that he was a citizen of the United States in connection with this application, as to which citizenship of the person executing the application or indeed of the concern itself is entirely immaterial under the law except where "on-sale" license is being sought (California Business and Professions Code, Sec. 23788).

In its opinion of May 20, 1957 this Court has held that the element of wilfulness requires proof beyond a reasonable doubt "that the misrepresentation was voluntarily and deliberately made," and that the mere signed document did not itself prove that element. The Court concluded, however, that because appellant had admittedly signed the document, evidence of other misrepresentations could prove that he voluntarily and deliberately made the representation of citizenship which had been typed in the body of the document. But the prosecution cannot establish the making of this representation by proof that he made other representations; the most that can be said is that *had it been shown* by other evidence that appellant had either furnished the data contained in the document or been aware of the presence of the representation in the document when he signed it, then evidence of similar representations by him might tend to show that the

representation so made was not made innocently, in good faith, or without knowledge of its falsity.

It is indisputable that appellant did not prepare the document, that he did not participate in its preparation, that he was not present when it was prepared and that he did not furnish the information contained in it. Unless he read the document when Helton placed it in front of him for signature then he neither made the representation as to citizenship contained therein nor adopted it. The narrow issue, therefore, was whether he had read it. Certainly proof of other acts at other times could not tend in any way to prove the reading of the document by him on this occasion. The case is very similar in this respect to

United States v. Gulotta, 29 F. S. 947,

wherein the Court dismissed one charge based on defendant having signed an entry in a voting register (there being no evidence that he had personally furnished the data shown in the entry), even though a similar representation at another time was proved.

CONCLUSION.

Upon this entire record there is the gravest doubt whether anything more than carelessness was involved, and whether the trial Court did not erroneously conclude that mere carelessness would justify conviction. Upon such a doubtful and equivocal state of the record, we submit, the conviction should not be permitted to rest upon the dubious foundation of proof of other acts for which appellant is not now being prosecuted.

"It is universally held that in cases based upon circumstantial evidence, a verdict of guilty may be rendered by the trier of the facts only when the evidence may be said to exclude every reasonable hypothesis except that of guilt and to be inconsistent with every hypothesis of innocence (citing cases)."

Maenza v. United States (CA 5), 242 F (2d) 339, 441.

"* * * and this Court has frequently held that evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction; and that where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction."

Ezzard v. United States (CA 8), 7 F (2d) 808, 812.

It is respectfully submitted that a rehearing should be granted.

Dated, San Francisco, California,
June 5, 1957.

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ARTHUR J. PHELAN,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

We hereby certify that we are counsel for Chow Bing Kew, appellant and petitioner in the above cause and that in our judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact and that said Petition for a Rehearing is not interposed for delay.

Dated, San Francisco, California,
June 5, 1957.

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